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PREPARATION AND ADOPTION OF A CONVENTION ON ARREST OF SHIPS

Compilation of comments and proposals by Governments and by intergovernmental and non-governmental organizations on the draft articles for a convention on arrest of ships

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INTRODUCTION

1. This document sets out the comments and proposals of Governments and intergovernmental and non-governmental organizations on the draft articles for a convention on arrest of ships that were received as of 15 October 1998.

COMPILATION OF COMMENTS AND PROPOSALS

Countries/territories

HONG KONG, CHINA

[Original: ENGLISH]

Article 1 (1)

2. The definition of "maritime claim" should be a well defined and closed list.

Article 1 (1) (g)

3. The words "or passengers in the ship" should be deleted from the text, as it may encourage litigation for numerous trivial claims (e.g. for disappointing holidays) which could lead to numerous unjustified arrests.

Article 1 (1) (h)

4. The words "(including luggage)" should be deleted, as this could lead to a serious risk of frivolous claims.

Article 1 (1) (n)

5. Include the words "docks and harbours", as many countries have dues for using docks and harbours.

Article 1 (1) (o)

6. "Social insurance" should be deleted, since it is the responsibility of the individual crew member to pay the amount.

Article 1 (1) (u)

7. The word "registrable" should be changed to "registered", as "registrable" is undefined.

Article 1 (2)

8. Add "or otherwise" after "conservatory measure" to make it broad enough to allow for different meanings in different countries.

Article 2 (3)

9. The square brackets may be removed but the words "or is sailing" should be deleted, as this may endanger the safety of the ship and persons on board and persons involved in the arrest of a ship.

Article 3 (1) (a)

10. "Operator" should be deleted, as the reference to "operator" is too broad.

Article 3 (1) (a) (i)

11. "And social insurance contributions" should be deleted, as in paragraph 6 above.

Article 3 (1) (a) (ii)

12. "Whether on land of on water" should read "whether on land or on water".

Article 3 (1) (b)

13. The square brackets may be removed, but the word "operator" should be deleted, as it is too broad and the term is undefined.

Article 3 (1) (c)

14. The word "registrable" should be reworded as "registered", as stated in paragraph 7.

Article 3 (1) (e) (i) and Article 3 (2)

15. "When the arrest is effected" should be changed to "when proceedings in which the arrest is effected are commenced", as this should quite comfortably fit civil law and common law jurisdictions. "When the arrest is effected" will give rise to uncertainty and dispute and it should be avoided, as should claims for unjustified arrest which may be generated by the transfer of ownership of a ship between commencement of proceedings and the date when an arrest is effected, whether in a common law or civil law jurisdiction. It may be impossible to ascertain whether there has been any such change of ownership between these two dates.

Article 3 (1) (e) (ii)

16. "The demise charterer of the ship is personally liable" should be changed to: "The demise charterer of the ship at the time when the maritime claim arose is personally liable".

Article 3 (2)

17. Delete the words "or ships" and "or are" in the first and second lines in order to avoid multiple arrests.

Article 4 (2)

18. Remove the square brackets and keep the words within the brackets, as the amount of security should not exceed the value of the ship.

Article 4 (4) (a)

19. Delete the words within the square brackets, as the "exceptional cases" and "unjust to do so" are too vague.

Article 4 (4) (b)

20. Remove the square brackets and keep the words within the brackets, as the amount of security required should not be excessive.

Article 5

21. Not supported, as the present legislation in Hong Kong, China, states that in relation to certain categories of claim, where a ship has been served with a writ or arrested in an action in rem brought to enforce the claim, no other ship may be served with a writ or arrested in that or any other action in rem brought to enforce that claim. We wish to maintain this and are not in favour of rearrest and multiple arrest.

Article 6

22. This article introduces the right of a court to set counter security for wrongful or unjustified arrest as a condition for the arrest of a ship. This right exists in some jurisdictions. It can be beneficial in making a claimant reconsider arrest in doubtful circumstances or where arrest may be contemplated as a means of applying unreasonable pressure. Certain interests, particularly cargo claimants may, therefore, object if this right extends beyond wrongful arrest claims to "unjustified" arrest claims. **This article is supported, as it deters wrongful arrests.**

JAPAN

[Original: ENGLISH]

23. The Government of Japan wishes to reserve its final stance on a Convention on Arrest of Ships until the Diplomatic Conference to be held next March.

24. However, its comments at the current stage on the draft articles for a Convention on Arrest of Ships are as follows:

Article 1 (1)

25. Opinions were divided within the Joint Group as to whether this article should adopt a similar approach to that of the 1952 Convention and provide an exhaustive list of maritime claims, or whether it should adopt a more flexible approach of retaining an open-ended list. The Government of Japan supports the position that this article should adopt an open-ended list, as we expressed ourselves at the ninth session of JIGE.

Article 2 (3)

26. This paragraph should not contradict the 1982 United Nations Convention on the Law of the Sea. Therefore, this paragraph can be admitted on condition that it does not affect the rules of other international conventions relating to arrest of a ship in the course of navigation.

JORDAN

[Original: ENGLISH]

Article (1) (2)

27. The Government of Jordan suggests that "Arrest" means any detention or restriction on removal of a ship as a conservatory measure by order of a judicial act (arbitral award or a court) to secure a maritime claim, so that it conforms to other articles which allow States to refer to arbitration.

KENYA

[Original: ENGLISH]

28. The Kenya Government considers the draft Convention on Arrest of Ships as an improvement of the existing position and hence a step in the right direction. However, our point of concern is the protection of the interests of port authorities when ships are arrested while in port.

29. We note that article 6 of the draft convention provides for protection of owners and demise charterers of arrested ships. There is, however, no mention of protection of port authorities for the consequences arising from arrests of ships of which the ports are not parties.

30. Our experience has been that, sometimes vessels are arrested at berth which causes a lot of inconvenience to the port and at times even loss of use of berths. In that event, the port is forced to apply to the arresting court to move the ships, incurring costs and expenses which might not be recovered from those who arrest the ships.

31. We therefore consider that there should be a specific clause for protection of port authorities. This clause should require the claimant seeking the arrest to provide security for any operational and legal costs that may arise or may be incurred by a port authority as a result of the arrest.

MEXICO

[Original: SPANISH]

General remarks

32. We recommend that in the Spanish text the word "mortgage" be replaced by the expression "hipoteca marítima". In the English text an explanation should be given of what is meant by "mortgage", since the word has several possible meanings.

33. In various parts of the document expressions of a subjective character are used. These should be deleted and replaced by objective criteria.

Article 1

34. The Government of Mexico is of the view that an approach admitting of both proposals should be adopted in the definitions. A definition and an open-ended list giving examples should be included, together with a list of possible claims likely to give rise to arrest of the ship; the article should end with a sentence permitting inclusion in the future of grounds for arrest not originally envisaged.

35. The proposed text for paragraph 1 of article 1 would read as follows:

> "1. 'Maritime claim' means any claim in respect of: [repeat the list of subparagraphs (a) to (v), replacing the English term 'mortgage'] ...
>
> The foregoing shall be without prejudice to the possibility of entertaining any other claims concerning or arising out of the ownership, construction, possession, management, operation or trading of any ship, or concerning or arising out of a mortgage or maritime claim, or a registrable charge of the same nature, on any ship, other than those mentioned."

36. Subparagraph (h) in this paragraph duplicates with subparagraph (a) and should therefore be deleted. The transport of goods and passengers' luggage is covered by the contracts under which ships are used, sometimes known as "ship operation" contracts.

37. Paragraph (2): for technical reasons of legal usage, we suggest a new and more positive drafting of this paragraph reading as follows:

> "'Arrest' means any detention or restriction on removal of a ship as a precautionary measure by order of a Court to secure a maritime claim. However, notwithstanding the foregoing, a ship shall not be arrested in execution or satisfaction of a judgement, arbitral award or other enforceable instrument; such cases shall give rise to the seizure or confiscation of the ship, according to the case."

Article 2

38. Replace the term "contracting State" by "State party" in view of the definition adopted by the 1969 Vienna Convention on the Law of Treaties. This change should be made throughout the draft.

39. A new drafting of paragraph 3 is proposed which incorporates the concept of the zone of jurisdiction of the State and makes a clear reference to the territorial waters of any State over which that State exercises full sovereignty. The paragraph would read as follows:

> "A ship may be arrested even though it is ready to sail or is sailing within the area of jurisdiction of the riparian State."

Article 3

40. The Government of Mexico considers the drafting of this article confused. In its view the Spanish term "gestor" ("manager" in English) should be replaced by the word "operador" and that the term "naviero" ("operator" in English) should be placed immediately after the word "owner" in subparagraph (b). The text would then read as follows:

> "[If] the claim against the owner, operator or demise charterer of the ship is secured by a maritime lien other than those mentioned in paragraph (a) and recognized under the law of the State where the arrest is requested; or"

41. The proposal made by the United Kingdom would be acceptable as regards subparagraphs (a) and (c) of paragraph 1 of this article, but subparagraph (b) would be superfluous.

Article 4

42. As regards release from arrest, and with reference to paragraph 2 of this article and subparagraph (b) of paragraph 4, the Government of Mexico considers that the brackets around the phrase "not exceeding the value of the ship" should be deleted, provided that, in the light of the 1969 protocols to the concerning oil pollution damage and the 1971 protocol on the establishment of the international compensation fund, the owner of the ship is able to limit his liability if he becomes a party in any event giving rise to the necessity of paying compensation in respect of damage caused in the territory of the State in which that event occurred.

43. In addition, the 1971 Convention establishing the fund (now known as the 1992 Convention) sets certain ceilings on the amounts of compensation payable in respect of accidents; those ceilings are fixed on the basis of various hypotheses (damage due to natural causes, to negligence, etc.). Finally, none of the above-mentioned conventions establishes a possibility that the liability of the owner of the ship may exceed the value of the latter in the event of an incident or an accident.

44. In the light of the foregoing, Mexico cannot agree to guarantees of payment of compensation for damage caused by its merchant shipping exceeding the ceilings laid down in those conventions.

45. As regards the phrase between brackets in subparagraphs (a) and (b) of paragraph 4, Mexico considers that it would be desirable to include the words "in respect of the same claim", as suggested in footnote 7. It also recommends deletion of the phrase "save in exceptional cases where it would be unjust to do so"; the phrase contains terms of a subjective nature, and the Government of Mexico therefore recommends a more precise legal drafting.

Article 5

46. The Government of Mexico considers that there should be no room for ambiguity in a legal instrument of the kind in course of preparation.

Consequently the use of the terms "reasonable grounds" and "reasonable steps" in subparagraph (c) of paragraph 1 are not acceptable.

Article 6

47. As in article 5, the words in brackets "or unjustified" in subparagraph (a) of paragraph 1 are considered to be a subjective criterion which should not appear in this text. The Government of Mexico therefore proposes that it be deleted and that the phrase should simply read: "the arrest having been wrongful".

Article 7

48. No comments.

Article 8

49. The Government of Mexico considers that the third paragraph of this article should be a separate article, since it refers, not to the application of the Convention, as does the rest of the article, but to the question of maritime lien as mentioned in article 3 of the instrument. It is therefore proposed that a new article (8 bis) be introduced.

Article 9

50. No comments.

Part B

Article (f)

Depositary

51. The Government of Mexico proposes that the Secretary-General of the United Nations should be the depositary of this instrument.

NETHERLANDS

[Original: English]

General remarks

52. The text of the draft articles for a convention on arrest of ships which was prepared by the IMO/UNCTAD Joint Intergovernmental Group of Expert on Maritime Liens and Mortgages is a good basis for consideration and adoption of a convention on arrest of ships during the proposed diplomatic conference. The text has been discussed during several meetings of the Group of Experts in which the issue of arrest has been carefully considered.

53. Apart from comments that will be presented during the Conference, the Netherlands would in particular make the following remarks as regards article 2, paragraph (3), on the issue of powers of arrest.

Article 2, paragraph (3)

54. This provision is between square brackets and now reads:

[(3) A ship may be arrested even though it is ready to sail or is sailing.]

In particular the insertion of the last three words: "or is sailing" is of concern for the Netherlands. One might recall that during the preparation by the Joint Group this subject was considered to a certain extent. In particular reference was made to the corresponding article 3, paragraph 1, of the 1952 Convention and it was suggested to retain the original text.

55. Apart from the difficulties that might arise from implementing the arrest of a ship already sailing and the safety implications that this might have, it is also very questionable whether such an arrest is the most efficient form of safeguarding maritime claims with a private interest. Therefore the Netherlands would like to support, at least, the deletion of the words "or is sailing" from the paragraph.

REPUBLIC OF KOREA

[Original: ENGLISH]

Article 1 - Definitions

56. Article 1 lists 22 different types of claims by which ships can be arrested. The 1993 Convention on Maritime Liens and Mortgages also lists in article 4, paragraph 1, grounds related to liens and mortgages on which claims can be made. As there are two lists that deal with very similar issues, it seems appropriate to ensure that any conflict between the two conventions is avoided.

Article 2 - Powers of arrest

57. Paragraph 3 of this article stipulates that a ship may be arrested even though it is ready to sail or is sailing. However, it is the view of the Republic of Korea that arrest of a ship which is ready to sail or is sailing is not desirable because it may destabilize normal practice of commerce by affecting customers not involved in the claim. Therefore, this paragraph should be deleted.

Article 7 - Jurisdiction on the merits of the case

58. Paragraph 3 - The purpose of this paragraph is to prevent long delays caused by a claimant's inertia in cases in which an arrest has been made or security given to prevent arrest or obtain the release of the ship where the Court of the State does not have jurisdiction or has refused to exercise jurisdiction.

59. However, it would seem reasonable to add to this article a stipulation that suggests that the Court of the State may order a period of time within which the claimants shall bring proceedings before a competent court or arbitral tribunal whether or not it has jurisdiction. This would entail that,

in cases where the Court of the State does have jurisdiction to determine the case upon its merits, this Court would also be allowed to order a period of time to present its case. This addition to article 7.3 would complement the stipulations already present and further prevent unnecessary delays.

60. Paragraph 4 - To speed up the releasing process and to optimize the implementation, it should be made clear in paragraph 4 that orders of release shall be given by the Court of the State without delay and without awaiting any other legal procedures such as hearings on the case.

SLOVAKIA

[Original: ENGLISH]

Article 1

61. In the interest of uniformity of international law and elimination of different explanations in individual jurisdictions, we agree with draft article 1 - Definitions - stating the term "maritime claim" and the list of maritime claims that give a claimant the right to arrest a ship. In the light of future developments in shipping, we support the wording "such as" used therein, which allows flexibility in enforcement of claims which are not enumerated in the list but may arise out of the operation of a ship in the future and are maritime in nature.

Article 2

62. In article 2, paragraph 3, the wording "... or is sailing" is to be deemed additional, although it is placed in brackets. Because the Convention does not consider arrest of ships in the course of navigation, leaving apart the possibility of doing so under national law in accordance with the article 6 of the Convention, we would support the notion not to include this wording in the text of article 2.

Article 3

63. In our opinion, article 3 (1) should include subparagraph (b) as it is drafted, i.e. to include the claim against the owner, demise charterer, manager or operator of the ship and not to include claims against time and voyage charterers as proposed by the delegation of the United States of America (JIGE (IX)/4).

SRI LANKA

[Original: ENGLISH]

Article 3 (e)

64. The provision in this article may be restricted to instances where there is a judgement of a court based on a "maritime claim" against an owner or a demise charterer.

Article 7 (2)

65. This clause permits a party to the convention to have provisions permitting the court arresting the ships to refuse to exercise jurisdiction in

favour of "another State". In our opinion the other State in favour of whom the refusal is made should be limited to States having a connection with the maritime claim or the ship arrested, i.e. the State where the maritime claim occurred and the State of registration of the ship.

SUDAN

[Original: Arabic]

Loss or damage caused by the operation of the ship

66. We believe that there should be a footnote defining port equipment and installations, warehoused goods and persons.

67. We believe that there is an element of unfairness, since some of this property is of trivial value. In our opinion, a ceiling should be placed on the amount of compensation (limitation of indemnity).

68. We believe that the ship should be on demise and not bareboat charter.

Article 2: Powers of arrest

69. We believe that the process should begin with the security, protection and arbitration bodies and then the courts, in the event of failure, and the port administrative authorities (harbour master).

70. When a ship is "ready to sail or is sailing": we believe that this is unfair towards the owners of the goods, particularly if the goods are perishable, such as fruit and vegetables, or form the subject of contracts, or in the case of ships transporting livestock or passengers. In our view, security should be an alternative to arrest.

Normal loss or damage

71. We believe that natural loss and damage should be viewed in the light of the criterion of fault.

Article 4 (4) (b)(i): Release of the ship

72. We believe that the phrase "whichever is the lower" should be amended to read "whichever covers or meets the maritime claim".

Article 6: Protection of owners and demise charterers of ships

73. We believe that the duration of the charter should be a factor in the decision-making process. For example, in the case of a ship the charter of which is about to expire, its arrest would be detrimental to the owner of the ship.

General comments

74. The articles concerning the port would be affected only in the event of direct arrest by a court, article 55 remaining valid.

75. We believe that provision should be made to supply the ship with fuel and food during the period of its arrest either through the court or the protection and security bodies or by making the agent responsible therefor.

76. Security in return for permission to sail is not mentioned by Bottamary. This is a detail that should be added.

77. Movement of the arrested ship to a safe berth would reduce the port's capacity. We believe that an arrested ship should be moored in the outer harbour, under the protection of the court, if the duration of the arrest is likely to exceed one week.

78. Arrest should be effected only in respect of a specified minimum claim of not less than $2,000, failing which the ship would be released on the basis of P & I surety or a letter of guarantee from the agent.

79. The arrest of ships transporting passengers, livestock and perishable, dangerous or hazardous goods should be regulated in separate instead of generally applicable articles.

THAILAND

[Original: ENGLISH]

Article 1 - Definitions

80. As regards the meaning of "maritime claim" in paragraph 1, the mixed approach combining a general definition clause with a non-exhaustive list of claims to introduce the examples of the categories of claims is preferable. The square brackets should therefore be removed. Subparagraph (p) should revert to "disbursements made in respect of the ship, by or on behalf of the master, owner, demise or other charterer or agent".

81. Paragraph 2 is acceptable, but the terms "other enforceable instrument" need to be carefully considered.

82. Paragraphs 3 - 5 are acceptable.

Article 2 - Powers of arrest

83. The terms "or is sailing" in paragraph 3 should be deleted. The matter may be left for decision by the law of the court where the arrest is made.

Article 3 - Exercise of right of arrest

84. The square brackets in paragraph 1 (b) should be removed to allow the enforcement of a national maritime lien through arrest. Without it, the right of a national maritime lien holder can be affected by the limit caused by paragraph 1 (e).

85. The square brackets in paragraph 1 (e) (ii) should also be removed. The right to arrest within this paragraph depends on personal liability. Personal liability includes liability through employment and delegation. For example, the shipowner is normally liable for the acts of the master and crew. Where a

claim arises when the ship is under voyage charter or time charter whereby the master and crew remain the servants of the owner, though being put at the disposal of the charterers, the personal liability lies with the owner, not the charterers. However, in the case of a demise charter, where the master and crew are the servants of the charterers, the owner will not be personally liable for the acts of the servants of the charterers. An arrest may be made against the ship in respect of which the claim is asserted if, at the time when the arrest is made, the charterers are still the demise charterers or have become the owners of the ship. Paragraphs 1 (e) (i) and (ii) pose a clear position about personal liability. The claimant of the demise charterers needs to effect an arrest within the currency of the charter. The right to arrest may come to an end when the charter expires, unless the charterers become the owners of the ship.

86. The square brackets in paragraph 2 (b) should also be removed. As a general principle, all assets of the debtor are available for execution. It is therefore logical to allow the arrest of any ship belonging to the party personally liable for a maritime claim as an alternative to the ship in respect of which the claim arose. For example, the owner of the ship in respect of which the claim arose should be allowed to arrest a vessel belonging to the charterers for disputes on charter party. Paragraph 2 follows the concept of the 1952 Convention, but the wording is amended to clarify that any ship belonging to the owner of the ship in respect which the claim arose is arrestable only where the owner is personally liable for the claim, and any ship belonging to the demise, time or voyage charterer is arrestable where that charterer is personally liable for the claim.

Article 4 - Release from arrest

87. The expression "not exceeding the value of the ship" in paragraph 2 should be deleted. Reference to the value of the ship could eventually force the court to pay more attention to the value of the ship than the amount of the claim. Moreover, in cases where it is clear that the amount of the claim is considerably higher than the value of an arrestable ship, it is unlikely that the claimant will arrest that ship to secure the claim because it is foreseeable that the recovery from the enforcement against the arrested ship will not be adequate. On the other hand, where the amount of the claim is not much higher than the current ship value, the claimant may be willing to effect an arrest, despite knowing that the ultimate recovery (from forced sale) may be less than the amount of the claim, in order to pressurize the shipowner into lodging alternative security. Reference to the value of the ship also seems to disturb the "interim measure" and "urgency" nature of arrest. The matter should be entirely at the court's discretion.

88. The terms "save in exceptional cases where it would be unjust to do so" in paragraph 4 (a) should be retained to give the court more flexibility in dealing with the matter.

89. Paragraph 4 (b) (ii) should be adjusted in accordance with the comment made in regard to paragraph 2.

Article 5 - Right of rearrest and multiple arrest

90. Reference to the value of the ship in paragraph 1 (a) should be deleted.

Article 6 - Protection of owners and demise charterers of the arrested ships

91. The principles of the article are acceptable. However, the word "unjustified" in paragraphs 1 (a) and 2 (a) should be deleted. "Unjustified" should be inherent in the general meaning of "wrongful". Having a new word which has never been internationally tried or tested can lead to an increase in disputes or problems in interpretation.

Article 7 - Jurisdiction on the merits of the case

92. The whole article is acceptable.

Article 8 - Application

93. Paragraph 3 should be an independent article, as in the 1952 Convention.

Article 9 - Reservations

94. The whole article is acceptable.

Part B - Final Clauses

95. The numbers of Contracting States for the entry into force of the Convention in article B (1) should be 25.

UNITED REPUBLIC OF TANZANIA

[Original: ENGLISH]

Article 3 (2)

96. On article 3 (2), concerning exercise of right of arrest which is permissible of any other ship in respect of which a maritime claim is asserted, we feel that more work is required to improve this article to avoid abuse in arresting other ships whose connection with the culprit is simple ownership. The relationship between the person liable and that of the ship has to be legally asserted and made very clear to avoid such abuse.

Article 4

97. The phrase "not exceeding the value of the ship", appearing in paragraphs 2 and 4 (b) (ii), should be retained.

Article 4 (4) (a)

98. With regard to article 4 (4) (a), the proposed phrase, "in respect of the same claim", after the words "a State Party" in paragraphs 4 (a) and 4 (b) of this Article should be inserted.

Article 4 (5)

99. With regard to article 4 (5), it is our opinion that it should be reviewed to ensure that, when security is provided, the same be properly determined to avoid provision of inadequate security that would call for an application to modify it at a later date.

Article 5 (1) (c)

100. With regard to article (5) (1) (c), it is our view that the circumstances of the release of a security should be clearly spelt out to avoid unnecessary abuses.

Article 6

101. Articles 6 (1) and 6 (2) (a), it is our opinion that the word "unjustified" should be well defined.

Article 8

102. With regard to article 8 (1), we agree that the words, "where the order has been made" be added after the phrase "jurisdiction of any State party".

103. With regard to article 8 (3), we wish to agree with the proposal that the paragraph either be an independent article or form part of article 3, depending on the reasons given by the delegation which has offered the proposal.

Article 9

104. With regard to article 9 concerning reservations, we do not favour conventions which provide for reservations by States Parties because reservations to some extent render a convention somehow ineffective in its applicability. It also reduces the degree of uniformity in its application. It is therefore our opinion that this Article be revisited with a view to deleting it.

Part B

105. With regard to the Draft Final clauses under Part "B", after examining them, we consider them as standard provisions in most international conventions and therefore we do not have specific comments to make on them since we find them in order.

Non-Governmental Organizations

THE INTERNATIONAL ASSOCIATION OF PORTS AND HARBORS (IAPH)

[Original: ENGLISH]

106. Throughout the world, ports are unwilling hosts of arrested vessels, which can block major berths for months and even years. Their operations are

impeded and they can suffer heavy commercial losses. At the same time, the activities of port users and the traffic flows can be affected, with a consequential detrimental impact on the economy.

107. Furthermore, ships' agents quite often resign their office, and safety and protection measures for the vessels and the environment depend upon the initiatives of the port authority alone.

108. Unhappily, the draft Convention which is to be submitted to the Diplomatic Conference deals with the issue as if it were a commercial law agreement between claimants and sued parties. It does not mention the fact that the detention of an arrested ship cannot take place elsewhere than within the domain of a third party, the host port.

109. The draft text is incomplete when it leaves major points to be settled without mention by national and procedural legislation. This is not consistent with the universality aimed at by maritime law.

110. The members of the Diplomatic Conference should be aware of the expectations of ports:

- The convention should mention that the arrest and detention of a ship take place in a port.

- In the event of default by the shipowner, the claimant should bear port dues and costs incurred by the arrest and detention of the ship.

- Following arrest, detention should be limited in time, before release renewal or conclusion by the forced sale of the ship.

111. It would be most useful if the preamble of the convention included reference to the needs for further legislation at the national level in order to protect the interests not only of ports but also of all other parties involved at local or regional levels.

112. Such legislation exists in certain national laws, but it should be generalized by a proposal within the preamble of the Convention in order to fill the gaps left by the Convention itself, before the closure of the Diplomatic Conference.

INTERNATIONAL CHAMBER OF SHIPPING (ICS)

[Original: ENGLISH]

Introduction

113. ICS participated in and supported the work of the Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects (JIGE), both during the preparation of the draft which became the 1993 International Convention on Maritime Liens and Mortgages (1993 MLM Convention) and the recent sessions at which the draft articles for a Convention on the Arrest of Ships (Draft Articles) were prepared. In

addition, ICS has encouraged its members to make representations to their Governments calling for the early ratification of the 1993 MLM Convention.

114. In its consideration of the draft articles, ICS would urge the Diplomatic Conference to be mindful of the following:

- It is of utmost importance to international trade that the free movement of ships is secured. To that end arrest must be viewed as an exceptional measure which should only be permissible in the case of justifiable claims related to the operation of ships. If the right to arrest ships were not regulated internationally, ships would be subject to frequent and in some cases arbitrary arrests for the same claims because they move through many jurisdictions each with their own national rules on arrest.

- The International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952 (1952 Arrest Convention) has achieved widespread international support - there are some 75 Contracting States - resulting in a considerable degree of uniformity of the law applicable to the enforcement of maritime claims.

115. ICS is prepared to support the introduction of a new Arrest Convention and would welcome alignment of the new instrument with the 1993 MLM Convention. However, it is our strong recommendation that there should be no unnecessary departures from the well known and understood provisions of the 1952 Convention.

116. ICS submits the following comments on the draft articles:

Article 1 - Definitions

Paragraph 1

117. The ICS preference is for a clearly defined and closed list of maritime claims in the interests of certainty and to ensure that arrest remains an exceptional measure. A closed list of clearly defined maritime claims would ensure consistency in interpretation in different jurisdictions and thereby promote greater international uniformity. The compromise reflected in the 1952 Convention between the common law and civil law approaches whereby arrest is only permitted in respect of claims of a maritime nature must be maintained. An open-ended list could lead to the exercise of the right of arrest in respect of claims which are not of a maritime nature and/or are of only minor importance, thereby causing needless detentions and consequential disruptions to international trade. ICS would be even more strenuously opposed to an open-ended list should the proposal to allow a right of arrest in respect of claims secured by non-internationally recognized maritime liens be accepted (see article 3, paragraph 2 (b)).

118. Individual maritime claims:

(b) We would question whether (b) is necessary in view of (a).

(d) Claims falling under the CLC and HNSC should be exempted as in Article 4 paragraph 2 (a), of the MLM Convention.

(u) Registration is a precondition for the recognition and enforcement of mortgages, "hypothèques" and charges under the MLM Convention. In the interests of aligning the Arrest Convention with the MLM Convention, ICS suggests that subparagraph (u) should read:

"a registered mortgage, a registered "hypothèque" or a **registered** charge of the same nature on the ship".

Article 2 - Powers of arrest

Paragraph 3

119. Arrest of ships while sailing may be dangerous from a safety perspective. Thus ICS cannot support departure from the text of article 3 (1) of the 1952 Convention and accordingly we are of the view that the phrase "or is sailing" should be deleted. Deletion of the phrase would not affect any rights under international public law conventions or national law.

Article 3 - Exercise of right of arrest

Paragraph 1 (b)

120. ICS is of the view that it should only be possible to arrest in respect of maritime claims which are secured by internationally recognized maritime liens. To allow arrest in respect of claims secured by national maritime liens would lead to considerably increased rights of arrest. However, if there is a wish to seek a compromise, ICS would be prepared to accept a right of arrest in respect of maritime claims secured by MLM article 6 "other maritime liens". We would therefore propose that text should be added to the draft subparagraph to make it clear that the national maritime liens in question are those which meet the basic requirements of MLM article 6. In addition, with reference to the second line of the draft subparagraph, if MLM article 6, maritime liens are accepted, ICS would deem it essential that "recognized" be deleted and replaced with "granted". "Granted" is consistent with MLM article 6 which provides that "Each State Party may, under its law, **grant** other maritime liens...". As was noted at the ninth session of the JIGE, the use of the word "recognized" could lead to increased forum shopping and would not promote harmonization of law.

Paragraph 1 (c)

121. To be consistent with article 1, paragraph 1 (u) the word "registrable" should be changed to "registered".

Paragraphs 1 (e) (ii)

122. ICS is of the view that article 3 paragraph 1 (e) (ii) should be deleted because it would allow, in jurisdictions where it is permissible, the judicial or forced sale of a ship which is owned by someone other than the person personally liable for the claim.

Article 4 - Release from arrest

Paragraph 2

123. ICS is of the view that the phrase "not exceeding the value of the ship" should be retained. However, we are concerned that it could be interpreted to mean that security up to the value of the ship must be provided in all cases in order to obtain release of the ship. The maximum security required should be the lowest of the limitation amount/global limitation of the ship or the value of the ship, and of course not more than the size of the claim. The square brackets in article 4, paragraphs (2) and (4) (b) (ii), should be deleted and the words therein retained. Article 5, paragraph (1) (a), should remain as drafted.

Article 6 - Protection of owners and demise charterers of arrested ships

Paragraph 1

124. ICS is of the view that the square brackets in article 6 paragraphs 1 (a) and 2 (a), should be deleted and the words "or unjustified" should remain.

125. ICS believes that at present the draft Convention is unbalanced because a defendant has to furnish security in order to obtain the release of the vessel, whereas claimants are not compelled to provide any security for losses incurred by the defendant for which the claimant may be found liable. ICS therefore strongly believes that the word "may" in the first line of article 6, paragraph 1, should be deleted and replaced with "shall". Concern has been expressed about the ability of certain claimants to provide security (e.g. crew members). However, that concern is addressed in the remainder of the paragraph which provides flexibility to deal with such situations. If the claimant's obligation to provide security was mandatory rather than discretionary, the court would remain responsible for determining the kind, amount and the terms of the security. In the situations which aroused concern, such security could in fact be nominal.

126. ICS would be happy to elaborate on these comments at the Diplomatic Conference.

COMITE MARITIME INTERNATIONAL

[Original: ENGLISH]

Introduction

127. The unification of the law on arrest of ships has been one of the subjects to which the CMI has given its careful attention. After the Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects had been established, an observer of the CMI attended all its sessions and through him the CMI gave all possible cooperation and assistance in the preparation of the draft which became the 1993 Convention on Maritime Liens and Mortgages and in the preparation of the draft articles for a Convention on Arrest of Ships.

128. It is now the wish of the CMI to give its cooperation and assistance in the last phase of the work, as it did for the 1993 MLM Convention and, for this purpose, the CMI submits to the Diplomatic Conference the following comments on the draft articles.

129. The comments are divided into two parts. In Part I there are comments on substantive points. Then in Part II there are comments on drafting points.

I. Substantive points

Article 1 - Definitions

Paragraph 1

Preamble

Whether the list of maritime claims should be an open ended list or a closed list.

130. It is suggested that the adoption of an open-ended list is the best solution. The closed list originates from section 22 of the United Kingdom Supreme Court of Judicature (Consolidation) Act, 1925, pursuant to which admiralty jurisdiction was granted only in respect of the claims listed therein. Even though there is, according to the Draft Rules, a link between the right of arrest and jurisdiction, because the Courts of the State in which the arrest is made have jurisdiction on the merits of the claim (Article 7), the main purpose of the uniform rules is to regulate the right of the claimant to obtain security for his claim. The compromise reached between the common law approach, which restricts the right of arrest, and the civil law approach, according to which arrest is permissible of any asset of the debtor as security for any claim, consisted - and must consist even in the future - in limiting the right of arrest of a ship to claims of a maritime nature but not to certain maritime claims only. A closed list, however carefully prepared, may not be or remain complete. The additions that have already been made to the list contained in article 1 (1) of the 1952 Convention illustrate this point.

Whether registration should be a requirement for mortgages, "hypothèques" and charges.

131. Since under the 1993 MLM convention (as well as under the previous Conventions) registration is a condition for the recognition and enforcement of mortgages, "hypothèques" and charges, it is suggested that the same should hold for the right of arrest. If this suggestion is accepted, the preamble should be amended as follows:

> (1) "Maritime claim" means any claim concerning or arising out of the ownership, building, possession, management, operation or trading of any ship, or concerning or arising out of a registered mortgage or "hypothèque" or charge of the same nature on any ship, such as any claim in respect of:

132. There is a category of claims which might be considered to be of a maritime nature but which are neither covered by the chapeau nor mentioned in the list. These are claims arising out of contracts for the financing of the construction or the repair or the purchase of a ship. Whether or not these claims are indeed of a maritime nature is a question for discussion.

133. Individual maritime claims

(d) The words "removal or attempted removal" and "preventive measures or similar operations" seem to repeat twice the same concept. In both the CLC 1969 and the 1996 HNS Convention, "preventive measures" are defined as "reasonable measures taken to prevent or minimize" damage. It is suggested that perhaps this definition may be used here and that the reference to "similar operations" is unnecessary.

The words "or losses incurred, or likely to be incurred, by third parties" give the impression that the losses referred to are a new category of maritime claim, not connected with the "removal or attempted removal of [a threat of] damage" etc. Furthermore, it is not clear why the expression "third parties" has been used. Perhaps the Conference might consider the following text:

> "the cost of measures taken by any person to prevent or minimize damage including environmental damage, [whether] [when] such claim arises under any international convention [,] any enactment or agreement, including losses incurred [,] or likely to be incurred in connection with such measures."

The use of the word "whether" instead of "whether or not" has the effect that only a claim which arises under an international convention or under an enactment or under an agreement would be within the scope of this category of claim. If that is so, there seems to be no reason to use the word "whether". "When" might in such case be a better word. The comma after "international convention" and the comma after "losses incurred" may be deleted.

(m) In the 1993 MLM Convention, reference is made (article 7, para. 1) to claims of the ship repairer for repair "including reconstruction" of the vessel. Since converting and reconstructing is not the same thing, it is suggested that it would be appropriate to use both terms.

This subparagraph could, therefore, be amended as follows:

> (m) building, repairing, converting, reconstructing or equipping of the ship;

(n) It is not clear why there is no longer any reference to "dock charges". Dock charges are probably included in (l) under "services", but if there is any doubt about this, it would be advisable to insert the words "including dock charges".

(o) There does not seem to be any reason to categorize as a maritime claim only the social insurance contributions payable on behalf of the master, officers and other members of the ship's complement when all claims for

insurance premiums in respect of a ship are within the categories of maritime claims. If this remark is accepted, the following text may be considered:

> Wages and other sums due to or payable in respect of the master, officers and other members of the ship's complement in respect of their employment on the ship, including but not restricted to costs of repatriation and social insurance contributions.

(p) It is suggested that the existing text be deleted and replaced by: "Disbursements made in respect of the ship". It does not in fact seem necessary to indicate by which persons the disbursement are made.

(u) For the reasons stated with respect to the preamble, the word "registrable" before "charges" should be deleted and subparagraph (u) should read:

> a registered mortgage, a registered "hypothèque" or a registered charge of the same nature on the ship.

Paragraph 2

134. Whilst in the English text the words "removal of a ship" are used, in the French text the words used are "départ d'un navire". The word "dêpart" seems preferable and, if this is agreed, "removal" could be replaced by "departure".

Article 2 - Powers of arrest

General comment - When the arrest is permissible.

135. It is not clear from the present wording of this article whether it has been intended that a mere assertion of a claim should be sufficient in order to obtain an order of arrest. Nor is it clear whether the claimant must prove that he needs security, for example because the financial conditions of the debtor are such as to create uncertainty in respect of the future enforcement of a judgment. The provisions of the 1952 Convention have been differently interpreted in different jurisdictions in these respects. It is suggested that all these matters should be left to the lex fori and that, in order to make that clear, reference should be made to the circumstances in which the arrest may be obtained. Paragraph 5 could be reworded as follows:

> Subject to the provisions of this Convention, the law of the State in which the arrest of a ship or its release is applied for shall determine the circumstances in which arrest or release from arrest may be obtained and the procedure relating thereto.

Paragraph 3 - Arrest of a ship ready to sail or which is sailing.

136. In view of the comments made during the sessions of the JIGE, it is suggested that this paragraph be deleted and that the question whether a ship ready to sail or which is sailing may be arrested should be left to the lex fori to decide.

Article 3 - Exercise of right of arrest

Paragraph 1

137. It is submitted that the order in which the provisions contained in aticle 3 have been set out in the Lisbon Draft and now in the daft aticles should be reconsidered. In fact, the general rule on the conditions for the arrest of a ship is that set out in the present paragraph 1 (e) (i). It is thought that it would be clearer if the general rule were set out first, followed by the rules presently contained in subparagraphs (e) (ii), (c), (d) and by the special provisions in respect of claims secured by maritime liens.

138. The incorporation of the 1993 MLM Convention maritime liens in subparagraph (a) had been done in order to avoid a reference to such Convention. Subsequently, during the sessions of the JIGE it was proposed to add a reference also to the maritime liens recognized under the law of the State where the arrest is requested. It is thought that this proposal is sound, for the reference to such liens would significantly facilitate ratification of the Convention by States that do not intend to become parties to the 1993 MLM Convention.

139. If the proposal mentioned above were to be accepted by the Conference, the reproduction in subparagraph (a) of the 1993 MLM Convention maritime liens would become superfluous, because such liens would obviously be recognized by the law of the State where the arrest is applied for if such State is a party to the Convention.

140. Paragraph (1) of article 3 would thus become less heavy and could read as follows:

> (1) Arrest is permissible of any ship in respect of which a maritime claim is asserted if:
>
> (i) the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected; or
>
> (ii) the demise charterer of the ship at the time when the maritime claim arose is liable for the claim and is demise charterer or owner of the ship when the arrest is effected; or
>
> (iii) the claim is based upon a registered mortgage or a registered "hypothèque" or a registered charge of the same nature on the ship; or
>
> (iv) the claim relates to the ownership or possession of the ship; or
>
> (v) the claim is against the owner, demise charterer, manager or operator of the ship and is secured by a maritime lien which is recognized under the law of the State where the arrest is applied for.

141. The following comments are necessary:

(1) Paragraph 1 (ii) (presently paragraph 1 (e) (ii)) has been amended by including, as in paragraph 1 (i), the words "at the time when the maritime claim arose".

(2) Since in article 1 (i) (u) reference is made to registered mortgages, "hypothèques" or charges, such reference is even more necessary in this article 3 (2) (a) where the fact that the claim is secured by a mortgage, "hypothèque" or charge enables the holder of the security to arrest the ship even if it is not owned by the debtor.

(3) It has been clearly stated during the Sessions of the JIGE that the reference to the law of the State where the arrest is applied for includes the conflict of law rules in force in such State.

Paragraph 2 - Right of arrest of other ships.

142. Two problems arise in respect of this paragraph: (a) whether the right to arrest other ships may be granted also when the person liable is the demise charterer, time charterer or voyage charterer of the ship in respect of which the maritime claim arose, and (b) whether the owner of such other ship(s) is only the registered owner or whether piercing the corporate veil is permitted.

(a) The right of arrest of ships owned by the demise charterer, time charterer or voyage charterer as security for claims that have arisen in respect of the chartered ship is the only means available to the claimant to obtain security, since he may not - except for the demise charterer but only within the limits set out in the subsequent paragraph 3 - arrest the ship in respect of which the claim has arisen.

It is thought, therefore, that the provision in subparagraph (b) should be maintained and the square brackets should be deleted.

(b) Article 3 (2) of the 1952 Convention provides that ships are deemed to be in the same ownership when all shares therein are owned by the same person or persons. This provision has sometimes been considered not to permit piercing the corporate veil. In particular, the French decisions upholding the arrest of a ship owned by a different company, when the same person or persons control and operate that company and the company owning the ship in respect of which the maritime claim arose have been considered to be in breach of article 3 (2).

This provision has not been reproduced in the Lisbon Draft nor in the draft articles. However, article 3 (2) of the draft articles could be interpreted in such a way as to limit the right of arrest and to prohibit piercing of the corporate veil.

If the Conference agrees that this problem should be left to national law and will consider that article 3 (2) could be interpreted as suggested above, an amendment for the purpose of excluding the possibility of such interpretation would be advisable.

In such a case the following sentence, to be added after subparagraphs (a) and (b), could be considered:

> The question whether a ship is owned by the person who is liable for the maritime claim shall be decided in accordance with the national law of the State in which the arrest is applied for.

Article 4 - Release from arrest

143. The provision, added in the Lisbon Draft, whereby the amount of the security may not exceed the value of the ship was criticized by the United Kingdom delegation, which pointed out that it may be in conflict with the applicable limitation convention (which, pursuant to article 8 (6) takes precedence over the new Arrest Convention), since the limitation may often exceed the value of the ship. This comment is very likely based on the provision of article 13 (2) of the 1976 Convention, whereby after the limitation fund has been constituted any ship belonging to a person on behalf of whom the fund has been constituted which has been arrested for a claim which may be raised against the fund may (or shall, in certain cases) be released. Following the comment from the United Kingdom the words "not exceeding the value of the ship" have been placed in square brackets.

144. The reason given for the deletion of these words seems, however, to be misconceived. In fact, there is no connection at all between the reason why a ship should be released from arrest when security is given for an amount equal to the value of the ship and the reason why the ship may not be arrested after the limitation fund has been established.

145. In the former case, the ship is arrested as security for the claim of the arrestor and in case the security is enforced, the amount the arrestor may obtain cannot exceed the value of the ship. It follows that the owner of the ship should be entitled to replace the ship with other security of equal value.

146. In the case of the establishment of the limitation fund, the release of the ship is not the consequence of the provision of security for the claim of the arrestor, but rather the consequence of the claimants being prevented from enforcing their claims on assets of their debtor other than the limitation fund. If the owner of the ship has obtained the release of the ship by providing security, whatever its amount, he may still be subject to the actions of other claimants in respect of claims arising out of the same accident or occurrence and, in order to prevent individual actions against his ships and his other assets, he must commence limitation proceedings and constitute a limitation fund. Only after the fund has been constituted the security may be released in the circumstances set out in article 11 of the Limitation Convention.

147. The security for the release of the ship from arrest and the limitation fund are, therefore, entirely separate and relate to different interests.

Article 5 - Right of rearrest and multiple arrest

Paragraph 1

148. The situation where security is given to prevent the arrest should be mentioned in the preamble of this paragraph, as it is mentioned in article 7 (1). The preamble could consequently be amended as follows:

(1) Where in any State a ship has been arrested to secure a maritime claim or security has been given to prevent arrest or obtain the release of the ship, that ship shall not thereafter be rearrested or arrested in respect of the same maritime claim unless:

Paragraph 2

149. In order to make clear that this paragraph regulates the case of multiple arrest, the present text should be preceded by a preamble similar to that of paragraph (1). Furthermore, the case should be mentioned where a ship has been arrested and is still under arrest at the time when the arrest of another ship is requested. To this effect this paragraph could be reworded as follows:

(2) Where in any State a ship has been arrested to secure a maritime claim or security has been given to prevent arrest or obtain the release of the ship, any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless:

(a) no security has been given to obtain the release of the first ship from arrest, or the value of that ship is less than the amount of the claim; or

(b) the nature or amount of the security already obtained in respect of the same claim is inadequate; or

(c) the provisions of paragraph (1) (b) or (c) of this article are applicable.

Article 6 - Protection of owners and demise charterers of arrested ships

150. In the heading of article 6 reference is made to the owner and to the demise charterer. It would appear therefore that the intention was to consider the owner and the demise charterer as the persons in whose favour security can be provided even though no reference is made to the demise charterer in the text of this article. It is thought however that in certain jurisdictions persons other than the demise charterer may be entitled to obtain protection such as, for example, time charterers. It is suggested, therefore, that the present heading be replaced by a more general one, such as: "Liability for wrongful arrest" or "Liability for wrongful or unjustified arrest" if the words "or unjustified" are retained in paragraphs 1 (a) and 2 (a).

Paragraph 1

151. The words "or unjustified" in paragraph (1) (a) as well as in paragraph 2 (a) have been placed in square brackets since it was objected that under (a) they would have enabled courts to impose security upon the claimant and under 2 (a) to determine his liability in situations the nature of which is not clearly defined.

152. It is thought that there are situations which do not come within the concept of wrongful arrest but nevertheless justify the imposition of security and the assessment of liquidated damages. This is the case, for example, when there is no possible doubt about the solvency of the owner or when the arrest is not required in order to prevent the extinction of a maritime lien.

153. Attention must be drawn to the fact that there would in any event be complete freedom of the courts in respect of the imposition of security and the liquidation of damages since the situations mentioned in (a) and (b) are preceded by the words "including but not restricted to such loss or damage as may be incurred ... in consequence of".

Paragraph 2

154. The remark made during the ninth session of JIGE that in paragraph 2 of article 6 reference should also be made to the case in which security is given to prevent arrest is correct. In fact a loss may also occur in such a case if the amount of the security is excessive.

155. This paragraph could, therefore, be amended as follows:

> (2) The Courts of the State in which an arrest has been effected or security given to prevent arrest shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused thereby, including but not restricted to such loss or damage as may be caused in consequence of:
>
> (a) the arrest having been wrongful or unjustified; or
>
> (b) excessive security having been demanded and obtained.

Article 7 - Jurisdiction on the merits of the case

156. The meaning of the words "due process of law" in paragraph (5) may not be clearly understood in some jurisdictions and it is, therefore, suggested to use the same expression adopted in article 10 (1) of the CLC 1969: "reasonable notice and a fair opportunity to present his case"". Paragraph 5 should consequently be amended as follows:

> If proceedings are brought within the period of time ordered in accordance with paragraph (3) of this article, or if proceedings before a competent Court or arbitral tribunal in another State are brought in the absence of such order, then unless the defendant has not been given a reasonable notice of such proceedings and a reasonable opportunity to

present his case, any final decision resulting therefrom shall be recognized and given effect with respect to the arrested ship or to the security given in order to prevent its arrest or obtain its release.

Article 8 - Application

Paragraph 1

157. A question to be considered is whether it would be advisable to reinstate the principle that ships flying the flag of a non-party State may also be arrested for any claim, whether maritime or not, for which the law of the State Party permits arrest.

158. Article 8 (2) of the 1952 Arrest Convention provides that a ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in article 1 or of any other claim for which the law of the Contracting State permits the arrest. Since it was not clear whether that meant that the Convention as a whole applied to ships flying the flag of non-Contracting States, subject to such ships being liable to arrest also in respect of claims for which the lex fori permits arrest, article 8 (1) of the Lisbon Draft provided generally that the Convention applies to any seagoing ship whether or not that ship is flying the flag of a State Party, and this provision was adopted by the JIGE.

159. If the Conference decides that total equality of treatment for ships flying the flag of States Parties and ships flying the flag of non-party States is not the right solution, because it may eliminate an incentive to ratification, the provision of article 8 (2) of the Arrest Convention could be reinstated and article 8 (1) of the draft articles amended as follows:

(1) This Convention shall apply:

(a) to any seagoing ship within the jurisdiction of a State Party flying the flag of a State Party; and

(b) to any seagoing ship within the jurisdiction of a State Party flying the flag of a State non-Party except that notwithstanding article 2, paragraph 2 any such ship may be arrested in respect of any claim, in addition to those listed in article 1 (1), for which the law of such State Party permits arrest.

If this amendment is adopted, article 9 becomes superfluous.

Paragraph 3

160. The provision in this paragraph has no relation with the application of the Convention, and it is suggested that it should be moved to a separate article.

II. Drafting points

Article 2

Paragraph 1

161. The words "by or under" (the authority) seem to be redundant. It is suggested that the words "by or" be deleted so that the text would read: " ... only under the authority ...".

Articles 2 (4), 3 (1) (b), 3 (1) (e) (i) and (ii) and 2, 3 (3), 6 (2) and (3) and 7 (1), (2), (3) and (6)

162. The word "effected" with respect to the arrest is used in article 2 (4), in article 3 (1) (e) (i) and (ii) and (2) and in article 6 (2) and (3). The word "made" is used in article 7 (1), (2), (3) and (6). It is suggested that the same word be used throughout the text.

163. Similarly, the words "applied for" are used in this paragraph, whilst the word "requested" is used in article 3 (1) (b) and the word "demanded" is used in article 3 (3). Also in this case, the same word should be used throughout the text.

Article 3

Paragraph 3

164. The words "judicial or forced" (sale) seem to repeat the same concept twice. It is suggested that the words "judicial or" be deleted.

Article 6

Paragraphs 1 and 2

165. The wording in paragraphs (1) and (2) differ. In paragraph (1) in fact the words used are "... as may be incurred by the defendant in consequence of", whilst in paragraph (2) the words used are "... as may be caused in consequence of". It is considered that this latter wording is preferable.

166. Paragraph (1) could, therefore, be amended as follows:

> (1) The Court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be caused as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be caused in consequence of:

167. This wording would avoid the need to indicate the person who has suffered the loss. The word "defendant" does not seem in fact to be the

appropriate word in this context. "Defendant" is the person against whom proceedings are commenced by the claimant, and at the time security for damages may be ordered proceedings on the merits have very likely not commenced. Moreover persons other than the "defendant" may be entitled to protection under article 6.

Article 8

168. Perhaps a better heading could be: "Scope of application".

INTERNATIONAL SHIP SUPPLIERS ASSOCIATION (ISSA)

[Original: ENGLISH]

169. The Diplomatic Conference to be held in March next year to consider proposals for the revision of the 1952 Arrest of Sea-going Ships Convention (Arrest Convention) will mark the culmination of many years of work of the Joint IMO/UNCTAD Group of Experts (JIGE), whose work includes the drafting of the 1993 Convention on Maritime Liens and Mortgages (MLM Convention), a Convention which has received no support and has only been ratified by four States after five years.

170. In these circumstances, there is a danger that, if the Diplomatic Conference does not reconsider and amend some of the proposals of the JIGE, there will be contradictions and confusion with an existing Convention which is widely accepted by maritime States. In particular, the introduction of the requirement in article 3 of the revised Convention that to arrest a sea-going ship a claimant must be entitled to a maritime lien, unless the owner at the time of arrest is the owner at the time the credit, is a cause for major concern

171. In fact, the "Ratio Legis"" of the 1952 Arrest of Sea-going Ships Convention is derived from the general rights of a creditor to apprehend the property of a debtor where he fails to honour payment of agreed terms. This "Ratio Legis" is applicable in all branches of the right of arrest and recognized in the 1952 Arrest Convention which grants any maritime claimant the right of arrest until paid in full, against the asset value of the ship.

172. In the drafting of the 1993 Maritime Liens and Mortgages Convention an attempt was made to grant a totally different right to the recovery of payments due. It recognized that, when a debtor has insufficient funds to meet his liabilities, the major creditors need protection and that there must, therefore, be an agreed system of privilege ranking when a vessel is sold "under caution" by the courts, which is effected by the granting of a right to a maritime lien and prioritizing this right.

173. As a result, there is a dichotomy between the general principle that a supplier needs the protection of the asset value of the ship and the privilege granted to the holders of maritime liens.

174. This dichotomy is most marked in the proposed amendments to article 3 of the 1952 Arrest Convention, which discriminates between those entitled to a

maritime claim, as defined by article 1, and those entitled to maritime lien. If this discrimination is allowed, then the scope of a major international convention will be flawed.

175. The success of any international convention is dependent on a general consensus, which the 1952 Arrest Convention enjoys. The proposed amendment of article 3 will be discriminatory and cause confusion in maritime law. This will particularly apply where States have granted maritime liens under the terms allowed by article 6 of the 1993 MLM Convention and mean that in some countries a creditor has a right of arrest and in others not.

176. This amendment will be particularly unfair on the small claimant who, even though he may not be entitled to a maritime lien under the terms of the 1993 MLM Convention, arrests a vessel only to find that the name of the owner's company has been changed (which is common practice with owners who are trying to avoid payment). As a result, he is frustrated in his legitimate right to recover his debt and, to add insult to injury, may then find himself at risk under the new terms of article 6 of the proposed revised Arrest Convention for damages due to wrongful arrest.

177. It is submitted that endorsement of this situation is not the intention of the Diplomatic Conference, since in numerous sessions of the JIGE it has been promised that no substantial alterations will be made to the 1952 Arrest Convention and that revisions will be limited to terminology, so that it aligns itsself to the 1993 MLM Convention, and that this will only be done when the latter Convention has been shown to meet clearly the needs of States.

178. ISSA strongly submits to State representatives that the promise made not to make substantial amendments should be honoured and that the proposed amendments to article 3 should be withdrawn, leaving the full right to arrest to those entitled to a maritime claim, without any requirement to be entitled to a maritime lien, as in the 1952 Arrest of Sea-going Ships Convention.

179. It is further submitted that the "Entry into force" clause in Section B of the proposed draft must clearly specify that its "entry into force" is contingent on the 1993 MLM Convention having been ratified by the required number of States and itself "being in force" before any revision of the revised 1952 Arrest Convention can be applied in international law.

Intergovernmental Organizations

UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (ECE)

[Original: ENGLISH]

180. In 1965 ECE Governments adopted a Convention on the Registration of Inland Navigation Vessels, with two protocols annexed to it: Protocol No. 1 concerning Rights in rem in Inland Navigation Vessels; and Protocol No. 2 concerning Attachment and Forced Sale of Inland Navigation vessels (E/ECE/579-E/ECE-TRANS/540, copy attached). These Protocols, which are currently in force, deal with the same questions as the Convention on Maritime Liens and Mortgages of 1993 and the new draft Convention on Arrest of Ships, although exclusively with regard to inland navigation vessels.

181. We understand that the future UN/IMO instrument is expected to be applied to sea ships. Article 2 (2) of the draft says, for example, that "... a ship may only be arrested in respect of a **maritime** claim but in respect of no other claim".

182. In this respect, I believe the use of the term "inland navigation vessel" in the UN/ECE Protocol No. 2 and the term "ship" in the draft Convention on Arrest of Ships may lead to confusion, especially as far as so-called **vessels of mixed sea-river navigation** are concerned.

183. I therefore suggest that, in order to avoid any possible overlapping between the two instruments, the text of the draft Convention be adapted so that it is clear which of the two regimes is applicable in each particular case. I think this could be of help to Governments in implementing the future instrument.

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO)

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184. FAO supports the principle whereby seagoing ships can be arrested in order to secure a maritime claim. In particular, FAO is interested in such claims as it refers to "the wages and other sums due to the master, officers and other members of the ship´s complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf".

185. The FAO Code of Conduct for Responsible Fisheries sets out principles and international standards of behaviour to be observed in the conservation, management and development of all fisheries. It includes the following provisions in article 8, which are relevant to the proposed Convention:

> "8.28 Flag States should promote access to insurance coverage by owners and charterers of fishing vessels. Owners or charterers of fishing vessels should carry sufficient insurance cover to protect the crew of such vessels and their interests to indemnify third parties against loss or damage and to protect their own interests.
>
> 8.29 Flag States should ensure that crew members are entitled to repatriation, taking account of the principles laid down in the 'Repatriation of Seafarers Convention (Revised), 1987 (No. 166)'."

186. FAO considers that the proposed Convention will assist in the implementation of these provisions and supports the draft of article 1 (1) as written, where there is an exhaustive list of maritime claims.

187. With regard to article 1 (2) of the draft Convention, FAO draws attention to article 73 of the United Nations Convention on the Law of the Sea, which refers to the right of a coastal State to arrest vessels in the exercise of its sovereign rights to manage the living resources in the exclusive economic zone. FAO considers that such "arrests" be excluded under

article 1 (2). In particular, it is important to ensure that the rights of the coastal State to take measures under article 73 (1) are not undermined. Further, article 73 (2) requires that "Arrested vessels and their crew shall be promptly released upon the posting of reasonable bond or other security".

188. It is important to ensure that this provision remains unaffected by the proposed Convention. We would recommend that the draft Convention is explicit on this point. Perhaps the best way of safeguarding the provisions concerning "arrests" in the United Nations. Convention on the Law of the Sea which are not covered by the draft Convention would be to insert a new article to the effect that the present Convention shall be without prejudice to the provisions of the United Nations Convention on the Law of the Sea relating to arresting of vessels.

189. If FAO can be of assistance in proposing text to achieve these points, we would be glad to provide further assistance.